IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. NOAH RILEY CROOKS, Defendant-Appellant.	)	Supreme Court 16-0851

APPEAL FROM THE IOWA DISTRICT COURT
FOR MITCHELL COUNTY
HONORABLE GREGG R. ROSENBLADT
AND JAMES M. DREW, JUDGES

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 22nd day of June 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Noah Riley Crooks, # 6049684, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501-5767.

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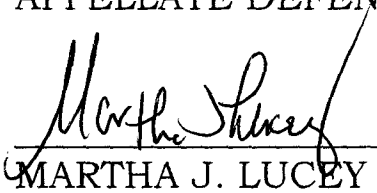

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c. The district court abused its discretion in imposing incarceration.

Authorities

No Authorities

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). This case presents a question as to the statutory authority to try and punish a thirteen year old as a "youthful offender" pursuant to Iowa Code sections 232.45(7) and 907.3A (2011). If the Code authorizes such a prosecution, the second question of first impression presented is whether the youthful offender statutes violate Article I, section 17 of the Iowa Constitution.

STATEMENT OF THE CASE

Nature of the Case: Noah Crooks appeals following judgment and sentence for murder in the second degree in violation of Iowa Code §707.3 (2011).

Course of Proceeding and Disposition Below: On March 28, 2012, the State filed a delinquency petition alleging Crooks committed the delinquent acts of murder in the first degree and assault with the intent to commit sexual abuse on March 24,

2012. Crooks was thirteen years old. (Petition)(Conf.App. pp. 6-7). The State moved the juvenile court to waive its jurisdiction in order for Crooks to be tried as a "youthful offender" as provided in Iowa Code section 232.45(7)(2011). (Motion to Waive)(Conf.App. pp. 8-11).

Crooks filed two motions to dismiss the motion to waive jurisdiction. The first motion challenged the statutory authority to waive a thirteen year old. (4/3/12 Motion to Dismiss)(Conf.App. p. 12). The second motion asserted the "youthful offender" statute was unconstitutional. (5/1/12 Motion to Dismiss)(Conf.App. pp. 50-51). The juvenile court denied both motions. (Ruling (Statutory Basis); Ruling (Constitutional Claims))(Conf.App. pp. 43-49, 77-84).

After hearing, the juvenile court waived its jurisdiction and transferred the case to the district court for prosecution as a "youthful offender". (10/3/12 Ruling on Motion to Waive)(Conf.App. pp. 105-134). The State filed a Trial Information in the district court on October 9, 2012. The Trial Information alleged murder in the first degree (Ct. I) and assault

with the intent to commit sexual abuse (Ct. II). (TI)(App. pp. 4-5). Crooks asserted the defenses of legal insanity and diminished responsibility. (10/12/12 Notice of Defense)(App. p. 6).

Jury trial began on April 30, 2013. (Tr. p. 1L1-25). On May 13, 2013, the jury returned a verdict finding Crooks guilty of murder in the second degree (Ct. I) and not guilty of assault with the intent to commit sexual abuse (Ct. II). The court ordered Crooks to be placed on "youthful offender" status and transferred his supervision to the juvenile court for disposition in accordance with Iowa Code section 232.52. (5/13/13 Order)(App. p. 7).

A dispositional hearing was held on May 30, 2013. (5/30/13 Tr. p. 1L1-25). Guardianship of Crooks was transferred to the director of the Department of Human Services for placement at the State Training School. Crooks was subject to the supervision of the juvenile court until his eighteenth birthday. (Dispositional Order)(Conf.App. pp. 149-152). Review hearings were held yearly. Crooks

remained at the State Training School. (5/22/14 Review Order; 5/22/15 Review Order)(App. pp. 8-10).

The Juvenile Court Officer filed a Youthful Offender Report on April 15, 2016. (JCO Youthful Offender Report)(Conf.App. pp. 169-171). On April 29, 2016, the juvenile court reported to the district court as required by Iowa Code section 232.56. (Report to Court)(App. pp. 16-18). The district court also ordered and received a presentence investigation report. (Order for PSI; PSI)(App. 14-15; Conf.App. pp. 153-163).

On May 6, 2016, the district court held a hearing to determine Crooks' status following his eighteenth birthday. (5/6/16 Tr. p. 1L1-25). Pursuant Iowa Code section 907.3A(2) (2011), the district court determined Crooks should continue on "youthful offender" status. (5/6/16 Tr. p. 31L22-p. 33L15). The district court entered judgment and sentence for murder in the second degree. The district court ordered Crooks to be incarcerated for a term not to exceed fifty years with no minimum mandatory sentence. (5/6/16 Tr. p. 36L20-p.

37L22; Judgment & Sentence)(App. pp. 19-21). Notice of Appeal was filed on May 16, 2016. (Notice) (App. pp. 22-23).

Facts: In March 2012, Noah Crooks[1] was thirteen years old. (Tr. p. 433L25-p. 434L7, p. 435L25-p. 436L5). Noah lived with his mother, Gretchen, and father, William, in rural Osage. (Tr. p. 433L12-15, p. 435L4-11). Noah was in the eighth grade. (Tr. p. 435L23-24).

March 24, 2012, Noah was grounded because of bad grades. He was not allowed to play video games unless William bent the rules. (Tr. p. 437L7-24). William left the family home at approximately 5:30 p.m. to attend a work-related party in Mason City. (Tr. p. 438L3-13).

Gretchen was doing her homework in the living room.[2] Noah was in the garage. (Tr. p. 438L14-17). William communicated with Gretchen at approximately 7:10 p.m. (Tr. p. 438L18-p. 439L3).

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1 Members of the Crooks family will be referred to by first names.

2 Gretchen was taking classes for a master in nursing. (Tr. p. 432L19-p. 433L11).

Noah sent William a text message at approximately 7:30 p.m. The message said "Dad, you need to come home. I accidentally killed Mom." William thought Noah was joking. He responded "Okay. Just throw her in the grove. We will take care of her later." (Tr. p. 439L6-p. 440L13).

At 7:29 p.m. Mitchell County 911 received a call from Worth County 911.[3] Noah reported he had just shot and tried to rape his mother. (Tr. p. 393L20-p. 394L10; Ct Ex. 1)(Conf.App. pp. 135-148). Noah reported: "I killed my mom with my twenty-two." (Ct. Ex. 1 p. 1L8-10)(Conf.App. p. 135); "I shot her, uh, with twenty rounds maybe" (Ct. Ex. 1p. 2L36-35)(Conf.App. p. 136); and "I tried to rape her, I couldn't do it." (Ct. Ex. 1 p. 3L75-79)(Conf.App. p. 137). When the 911 dispatcher indicated she was paging out the ambulance, Noah said "No, she's dead, like, trust ... She's, she's dead, dead." (Ct. Ex. 1, p. 6L231-234)(Conf.App. p. 140).

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3 Cellular phone callers from the southwest part of Mitchell County ping off the nearest tower and are routed to Worth County 911. (Tr. p. 393L23-p. 394L3).

Deputy Huftalin was dispatched to the Crooks' residence. (Tr. p. 398L20-p. 399L19). Huftalin knocked on the door announcing "Sheriff's Office." Noah opened the door. He was still on the phone with the 911 operator. Huftalin asked where his mother was. Noah pointed to the living room. Huftalin also asked where the gun was. Noah stated it was on a chair in the dining room. (Tr. p. 400L10-p. 401L8). Huftalin had Noah sit on the porch. (Tr. p. 402L6-10). Gretchen was slouched on the couch; her pajama top was unbuttoned and she was naked from the waist down. Huftalin could see bullet holes in her chest. (Tr. p. 402L11-p. 403L2, 487L2-p. 488L10, p. 490L11-20, p. 544L1-11, p. 545L1-p. 550L14). Huftalin confirmed Gretchen was deceased. (Tr. p. 403L3-6, L18-23). Huftalin placed handcuffs on Noah and put him into the patrol vehicle. (Tr. p. 403L7-11).

Huftalin described Noah as "very calm," "very stoic", "very monotone." (Tr. p. 412L14-17). Noah did not appear to be upset or disoriented. (Tr. p. 412L18-24). Another deputy

stated Noah really showed no reaction. He was just sitting on the step patiently waiting. (Tr. p.420L12-16).

Huftalin called William at 7:50 p.m. telling him there had been an accident and he needed to come home. (Tr. p. 440L17-p. 441L9, p. 404L5-24). Once home, William was informed Noah had shot Gretchen and she was dead. (Tr. p. 441L17-20).

Gretchen died from multiple gunshot wounds. (Tr. p. 557L5-12, p. 571L15-25). She suffered a total of twenty-two gunshot wounds; two to the head, four to the neck, fifteen to the chest, and a graze wound on the back of her right hand. (Tr. p. 559L24-p. 560L15, p. 561L20-p. 566L18).

At age five or six, Noah set his grandmother's house on fire. (Tr. p. 467L22-24). Noah was diagnosed with attention deficit hyperactivity disorder (ADHD). (Tr. p. 454L16-20). Noah had been on medication since the age of eight. On March 24, 2012, Noah was taking Vyvanse. (Tr. p. 446L25-p. 448L3, p. 450L24-p. 17). When Noah was in the fifth grade he pulled all of his hair out. Noah was prescribed Prozac. (Tr. p.

451L18-p. 453L5, p. 594L11-25, p. 607L19-23). Noah exhibited behavioral problems at school and on the school bus. (Tr. p. 453L6-12, p. 575L19-p. 577L17, p. 579L2-22, p. 585L2-p. 588L6, p. 595L15-p. 597L10, p. 606L11-p. 607L18, p. 608L6-p. 609L11). Noah was abusive to the family dogs. (Tr. p. 466L20-467L4). Approximately two years before his mother's death, Noah began to be violent. He cut up couch pillows. He also took a knife to the wood pillars in the house. Noah broke windows when he was sent to his room. A week prior to March 24th, Noah chipped at a door with a knife over thirty times. Noah could not explain his destructive behavior; he would say he did not remember and he was sorry. (Tr. p. 453L13-p. 455L16, p. 457L3-459L21, p. 465L21-p. 466L9).

Gretchen was the disciplinarian. Noah was not physically or sexually abused. On a few occasions when Noah and Gretchen argued, Noah said he wished she were dead in a ditch. (Tr. p. 448L4-p. 450L6). Noah told schoolmates he hated his mother and called her names. (Tr. p. 577L15-p. 578L25, p. 588L22-p. 589L24).

Defense expert Dr. Dewdney opined Noah has two diagnosis: ADHD and intermittent explosive disorder (IED). IED is a subtext of bipolar disorder. (Tr. p. 626L23-p. 627L12). Individuals with IED exhibit a disconnect between the precipitating event and the individual's reaction. An innocuous-provoking event may result in immense and uncontrollable rage. The reactions occur episodically. (Tr. p. 628L8-p. 629L11, p. 632L6-13). After an explosive event, children with IED generally are remorseful, apologetic and quite calm for a period of time. (Tr. p. 629L22-p. 630L20). Dewdney opined that when Noah was in the middle of a rage, there was no capacity for him to think about whether the act was right or wrong. (Tr. p. 639L21-p. 640L11, p. 644L25-p. 645L19, p. 650L8-19, p. 666L12-p. 667L10).

State expert Dr. Taylor opined Noah was not suffering from any diagnosable mental health disorder. Taylor opined Noah has deeply ingrained personality traits that allow him to do what he does and not feel any remorse or responsibility for himself. (Tr. p. 683L22-p. 686L11). Taylor concluded Noah

was fully capable of deliberating, premediating, and forming the intent to kill his mother. Noah knew the difference between right and wrong. (Tr. p. 686L12-p. 689L11).

State expert Dr. Salter opined Noah was clear-headed at the time he shot his mother. There was no evidence Noah had any psychotic process. Salter opined Noah knew the difference between right and wrong. Noah's actions were logical, goal-directed, and purposeful. (Tr. p. 727L11-p. 728L19). Salter opined Noah's diagnosis was conduct disorder. (Tr. p. 732L21-p. 736L4).

ARGUMENT

I. IOWA CODE SECTION 232.45(7)(a) (2011) DOES NOT PROVIDE STATUTORY AUTHORITY TO TRY A THIRTEEN YEAR OLD AS A YOUTHFUL OFFENDER.

Standard of Review.

Questions of statutory interpretation are reviewed for correction of errors at law. State v. Dudley, 766 N.W.2d 606, 612 (Iowa 2009).

Preservation of Error.

Crooks filed a motion to dismiss the motion to waive jurisdiction. (4/3/12 Motion to Dismiss)(Conf.App. p. 12). The district court denied the motion. (Ruling (Statutory Basis))(Conf.App. pp. 43-49). Error was preserved. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)(issues must be raised and decided by the district court).

Discussion.

The State moved to waive Crooks to district court for prosecution as a "youthful offender" pursuant to Iowa Code section 232.45(7) (2011). (Motion to Waive)(Conf.App. p. 8-11). Crooks moved to dismiss the motion to waive jurisdiction arguing there was no statutory authority to prosecute a thirteen year old as a "youthful offender". (4/3/12 Motion to Dismiss)(Conf.App. p. 12). After hearing, the district court denied the motion to dismiss. The court found:

> The differing language found in Sections 232.45(8) and 232.45(9) support the proposition that there are different age standards for waiver under Sections 232.45(6) and 232.45(7). This is further supported by the different procedures following waiver order, and for the vastly increased number of options

available to those waived as youthful offenders. Section 232.45(9)(c) specifically requires the Court to consider the age of the child in determining the appropriateness of waiver as a youthful offender and assessing prospects for rehabilitation.

(Ruling (Statutory Basis), p. 7)(Conf.App. p. 49).

Generally, the juvenile court has exclusive jurisdiction in proceedings concerning a child who is alleged to have committed a delinquent act. Iowa Code §232.8(1)(a) (2011). The juvenile court may waive its jurisdiction of a child alleged to have committed a public offense so that the child may be prosecuted as an adult or youthful offender for such offense in another court. Iowa Code §232.8(3)(a) (2011). Iowa Code section 232.45 sets forth the requirements for waiver of jurisdiction. Iowa Code section 232.45 (2011) provides, in relevant part:

1. After the filing of the petition which alleges that a child has committed a delinquent act on the basis of an alleged commission of a public offense and before an adjudicatory hearing on the merits of the petition is held, the county attorney or the child may file a motion requesting the court to waive its jurisdiction over the child for the alleged commission of the public offense or for the purpose of prosecution of the child as an adult or a youthful offender. ****
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6. At the conclusion of the waiver hearing the court may waive its jurisdiction over the child for the alleged commission of the public offense if all of the following apply:

a. The child is fourteen years of age or older.

b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute the public offense.

c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interest of the child and the community.

7. a. At the conclusion of the waiver hearing and after considering the best interests of the child and the best interests of the community the court may, in order that the child may be prosecuted as a youthful offender, waive its jurisdiction over the child if all of the following apply:

(1) The child is fifteen years of age or younger.

(2) The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute a public offense under section 232.8, subsection 1, paragraph "c", notwithstanding the application of that paragraph to children aged sixteen or older.

(3) The court determines that the state has established that there are not reasonable prospects for rehabilitating the child, prior to the child's eighteenth birthday, if the juvenile court

retains jurisdiction over the child and the child enters into a plea agreement, is a party to a consent decree, or is adjudicated to have committed the delinquent act.

b. The court shall retain jurisdiction over the child for the purposes of determining whether the child should be released from detention under section 232.23. ***

8. In making the determination required by subsection 6, paragraph "c", the factors which the court shall consider include but are not limited to the following:

a. The nature of the alleged delinquent act and the circumstances under which it was committed.

b. The nature and extent of the child's prior contact with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

9. In making the determination required by subsection 7, paragraph "a", subparagraph (3), the factors which the court shall consider include but are not limited to the following:

a. The nature of the alleged delinquent act and the circumstances under which it was committed.

b. The nature and extent of the child's prior contact with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

c. The age of the child, the programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the district court after the child reaches the age of eighteen in the event the child is given youthful offender status.

Iowa Code §232.45(1), (6)-(9) (2011).[4]

The "youthful offender" statutes were enacted in 1997. 1997 Iowa Acts, ch. 126. See also 77th GA 1st Session SF515, *available at* https://www.legis.iowa.gov/docs/publications/LGI/77/SF515.pdf. The "youthful offender" statutes were part of a large bill related to juvenile justice which included the creation of shared juvenile and adult jurisdiction of youthful offenders, and changes to possession of alcohol and tobacco under the legal age, fingerprinting of juveniles and the criteria for placement at State Training School (STS). Id. The explanation contained in Senate File 515 provided, in relevant part:

The bill also makes numerous changes to Code chapter 232, changes Code section 602.1211, and creates a new Code

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[4] Relevant to this case, Iowa Code section 232.8(1)(c) provides violations by a child, aged sixteen or older, which constitutes a forcible felony is excluded from the jurisdiction of the juvenile court. Iowa Code §232.8(1)(c) (2011).

section 907.3A to provide for shared jurisdiction between the adult and juvenile courts over a juvenile who has committed certain crimes. A juvenile who commits certain crimes would become subject to the jurisdiction of the district court to be tried or to plead guilty as an adult and would receive a deferred sentence and be placed on youthful offender probation as an adult. The juvenile would then be transferred to the supervision of the juvenile court which would enter a dispositional order as if it had adjudicated the juvenile a delinquent. At the juvenile's eighteenth birthday, unless supervision is terminated sooner by the juvenile court, the juvenile would be returned to the district court for a hearing at which the court will determine whether the juvenile, now an adult, should continue on youthful offender status or be discharged from youthful offender status as an adult.
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The bill provides that a juvenile may attain youthful offender status through the waiver of jurisdiction process in the manner that juveniles are currently waived from the jurisdiction of the juvenile court. The juvenile court can waive its jurisdiction for the purpose of the juvenile being prosecuted as a youthful offender after considering the best interest of the child and community, the resources available to the juvenile court prior to the juvenile's eighteenth birthday, and whether the juvenile should be subject to continued court supervision past the juvenile's eighteenth birthday.

A juvenile who is waived for the purpose of being prosecuted as a youthful offender would be held in a juvenile detention facility prior to trial, unless released on bail. Pretrial release conditions, if any, would be determined by the juvenile court at a detention hearing. The juvenile will be supervised by a juvenile court officer or juvenile court services personnel while in detention or on pretrial release.

In addition, juveniles who receive youthful offender deferred sentences shall be subject to the supervision of the juvenile

court while on youthful offender status until age 18, unless the juvenile court sooner terminates its supervision because it believes the juvenile has been, rehabilitated or the juvenile violates the terms of the juvenile court's order. If the termination is due to a violation of the terms of the order, the juvenile is treated the same as an adult who has been arrested for a probation violation. In this case, a juvenile could be sentenced as an adult for the youthful offender status violation, including the reinstatement of the deferred sentence and commitment to the department of corrections.

The bill provides that if the juvenile is still on youthful offender status under juvenile court supervision as the juvenile's eighteenth birthday approaches, the juvenile will have a hearing before the district court to determine if youthful offender status will continue. The district court may continue the youthful offender status for the offender after age 18 is reached after considering the best interests of the offender and the community. At this point, the offender will be treated the same as other adults who have received a deferred sentence and been placed on probation regarding services or placement. However, although the bill provides that youthful offenders are to be treated as adults, youthful offender deferred sentences will be given for offenses which would not be eligible for deferred sentence if committed by an adult.

77th GA 1st Session SF515, pp. 27-29.

The ultimate goal of statutory interpretation is to ascertain and give effect to the legislature's intent. State v. Allen, 708 N.W.2d 361, 366 (Iowa 2006). Legislative intent is discerned by the words chosen by the legislature, as well as the purposes and policies underlying the statute. Id. In interpreting

statutory language, courts must interpret the statute in its entirety, not just isolated words or phrases. Id. All words in the statute must be given effect, and the statute must not be interpreted in a way that portions of it become irrelevant, redundant, or superfluous. Id. Words that are not statutorily defined are generally given their ordinary and commonly understood meaning, considering the context in which they are used. Id. Additionally, criminal statutes are strictly construed with doubts resolved in the accused's favor. Id.; State v. Akers, 435 N.W.2d 332, 335 (Iowa 1989) (superseded by statute on unrelated grounds, as recognized in State v. Hagen, 840 N.W.2d 140, 152 (Iowa 2013)).

The legislature did not define "youthful offender." The logical assumption is the legislature intended "youthful offender" to mean a child waived for prosecution pursuant to Iowa Code section 232.45(7) (1997). In the waiver statute, the legislature used the language "for the purpose of prosecution of the child as an adult or a youthful offender." Iowa Code §232.45(1) (2011). "We assume the legislature intends

different meanings when it uses different terms in different portions of a statute." Miller v. Marshall Cnty., 641 N.W.2d 742, 749 (Iowa 2002)(citing 2A Norman J. Singer, Sutherland Statutory Construction § 46:06, at 194 (6th ed. 2000)). However, the legislature did not only use the term "youthful offender" in reference to juveniles waived for prosecution pursuant to Iowa Code section 232.45(7) (1997). See Iowa Code §602.6110(1) (1997)(Peer Review Court)[5]. Additionally, for purposes of prosecution for public offenses, there are only two courts with jurisdiction: adult (district court/district associate court) or juvenile. Iowa Code §§232.8, 602.6101, 602.6202, 602.6306, and 602.7101 (2011); Iowa Const. art. V, §1, 6.

With this background, this Court must decide which children can be prosecuted as "youthful offenders" in adult

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5 Subsequently amended by 98 Iowa Acts, ch. 1100, §77 (replacing "youthful" with "juvenile.").

court. The State's position below was that any child fifteen years old and younger may be prosecuted in adult court as a "youthful offender." (Response to Statement of Authorities)(Conf.App. pp. 28-42). This included a newborn child. (Tr. p. 20L6-22). Crooks asserted that he could not be prosecuted in adult court as a "youthful offender" because the statute required the child be fourteen or fifteen. (4/3/12 Motion to Dismiss; Statement of Authorities)(Conf.App. pp. 12, 15-27).

A statute is ambiguous if reasonable minds differ or are uncertain as to the meaning of the statute. Mall Real Estate, L.L.C. v. City of Hamburg, 818 N.W.2d 190, 198 (Iowa 2012). At first glance, the State's argument based strictly on the language of the subsection appears to make some sense. But as previous cases demonstrate, "great care must be used before declaring a statute unambiguous." Rhoads v. State, 880 N.W.2d 431, 446 (Iowa 2016). The Court has "noted the need to be circumspect regarding narrow claims of plain meaning and must strive to make sense of our law as a whole." Id.

"[T]he determination of whether a statute is ambiguous does not necessarily rest on close analysis of a handful of words or a phrase utilized by the legislature, but involves consideration of the language in context." Id. In looking at the Iowa Code as a whole, the language used in Iowa Code section 232.45(7)(a)(1) (2011) is ambiguous.

The legislature used different language to describe the age requirements for waiver for prosecution as "an adult" or "a youthful offender." Iowa Code §232.45(1), 232.45(6)(a) (fourteen years of age or older), and 232.45(7)(a)(1) (fifteen years of age or younger). The legislature did not specify the minimum and maximum ages. The Code clearly sets the ceiling for the juvenile court's jurisdiction as delinquent acts committed by a "child." Iowa Code §§232.2(5) and 232.8(1)(a) (2011)("child" means a person under eighteen years of age). Determining the floor for waiver to adult court for "youthful offender" prosecution may present a more difficult question.

The legislature has enacted several statutes related to the waiver of children to adult court. The language used in these

statutes do not clarify the meaning of "fifteen or younger." For example, Iowa Code section 232.8(3)(b) (2011) prohibits waiver of a child under the age of seventeen who is alleged to have committed an offense of animal torture in violation of Iowa Code section 717B.3A. Iowa Code §232.8(3)(b) (2011). The legislature did not specify the prohibition of waiver of fourteen, fifteen and sixteen year olds because it is understood from reading the code sections together. Only children seventeen years old may be prosecuted in adult court for animal torture.

The legislature has provided that a child twelve years old or younger shall not be placed in group shelter care home unless there have been reasonable but unsuccessful efforts to place the child in an emergency foster family home. Iowa Code §232.21(6) (2011). Under the prosecution's position, an eleven year old prosecuted as a youthful offender who is subject to adult penalties upon attaining majority cannot ordinarily even be placed in group shelter care. This demonstrates the legislature intended to treat young children differently.

Children under the age of fourteen cannot be held in a facility used for the detention of adults. Iowa Code §232.22(3)(c)(1) (2011). If a child has been waived for a forcible felony and there is a serious risk the child may commit an act which would inflict serious bodily harm on another person the child may be held in county jail in sight and sound segregation from adult offenders. Iowa Code §232.22(7) (2011). However, a child prosecuted as a "youthful offender" shall only be held in a juvenile detention home or other suitable facility other than an adult detention facility. Iowa Code §232.22(3) and 232.33(1) (2011). A child prosecuted as a "youthful offender" may also be held in lieu of bail. Iowa Code §§232.23(2)(a) and 232.44(2), (4), (5)(b)(4) (2011). On one hand, the detention provisions may show the intent that children younger than fourteen may be prosecuted as a "youthful offender". On the other hand, the provision of bail for a child under the age of fourteen seems contrary to the goals of the best interest of the child.

The juvenile court found the inclusion of "age of child" in Iowa Code section 232.45(9)(c) (2011) implied there may be difference in the ages of the children subject to waiver in sections 232.45(6) and 232.45(7). The juvenile court reasoned that otherwise the distinction of sections 232.45(8) and 232.45(9) would be rendered moot. (Ruling (Statutory Basis), p. 5)(Conf.App. p. 47). Sections 232.45(8) and 232.45(9) contain a nonexhaustive list of factors that the court should consider in making the waiver determination. State v. Tesch, 704 N.W.2d 440, 448 (Iowa 2005). The inclusion of "age" in section 232.45(9) does not mean the court should not consider the child's age in a waiver pursuant to section 232.45(6).

Additionally, the procedures used after waiver of juvenile court jurisdiction do not help in interpreting the statute's age requirement. Arguably, the "traditional" waiver to adult court pursuant to section 232.45(6) shows the child has been determined to not be amenable to juvenile court services. On the other hand, the juvenile court judge has determined a child waived for prosecution as a "youthful offender" pursuant to

section 232.45(7) may be is amenable to juvenile court services, but shared jurisdiction is the better route just in case he is not. The "youthful offender" poses a lesser risk to the community and shows greater potential for rehabilitation. The shared jurisdiction shows the cautious optimism for the child's rehabilitation. See also Iowa Code §232.45A(4) (2011)(exempting department of public safety notification of youthful offender conviction). This does not show the legislature had determined a child younger than fourteen should potentially be punished as an adult upon his eighteenth birthday. This is especially so when the legislature did not provide the authority for the "traditional" waiver of jurisdiction for the same offenders under the age of fourteen.

In 1997, the legislature amended section 232.52 related to dispositional orders. 1997 Act, ch. 126, §§ 26, 27. The legislature expanded the criteria for placement at the State Training School to include prior out of home placement as a result of a delinquency adjudication. 1997 Acts, ch. 51, § 1; 1997 Acts, ch. 208, § 40. However the legislature did not

change the general minimum age for placement at STS. Generally, a child must be at least twelve years of age and the court has found the child has committed a forcible felony, a felony violation of section 124.401 or chapter 707 or any three of four conditions exist.[6] Iowa Code §232.52(2)(e) (2011). Under the State's position, a youthful offender under the age of twelve may not even qualify for placement at STS but may be subject to incarceration with the Department of Corrections at age eighteen.

Finally, the legislature provided for the procedure if the "youthful offender" violates the conditions of the deferred sentence. Iowa Code §232.54(h) (2011). If a child is fourteen or older the juvenile court may terminate the dispositional order and return the child to the supervision of the district court under chapter 907. Iowa Code §232.54(h)(1) (2011). The youthful offender will be treated in the manner of an adult who has been arrested for a violation of probation under section

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6 (1) at least 15 years old; (2) aggravated or felony offense; (3) previous delinquent adjudication; or (4) placed out of home as result of prior delinquent adjudication. Iowa Code §232.52(2)(e) (2011).

908.11 for sentencing purposes only. Iowa Code §232.54(h)(3) (2011). The inclusion of "age fourteen or older" may show age fourteen is the floor for waiver for prosecution as a "youthful offender". Or it may show that child under the age of fourteen are eligible for prosecution as "youthful offenders" but fourteen is the minimum age for sentencing in adult court.

Reasonable minds can differ on the meaning of Iowa Code section 232.45(7)(a)(1) (2011). The statute is ambiguous. When a statute is ambiguous, the Court inquires further than the text. The Court considers "the objects to be accomplished and the evils and mischiefs sought to be remedied." Klinge v. Bentien, 725 N.W.2d 13, 18 (Iowa 2006). The Court seeks to advance, rather than defeat, the purpose of the statute. State v. Tesch, 704 N.W.2d at 451. When the statute is ambiguous, we may consider, among other things, "[t]he object sought to be obtained," "[t]he circumstances under which the statute was enacted," and "the consequences of a particular construction." Iowa Code §4.6 (2015).

Circumstances of enactment.

Senate File 515 had an explanation which is the best available evidence of legislative intent. The explanation stated the bill made changes to Chapter 232 to provide for shared jurisdiction between adult and juvenile courts over juveniles who had committed certain offenses. 77th GA 1st Session SF515, p. 27. Senate File 515's explanation did not include any reference to a change in the minimum age for waiver to adult court.

The State argued the legislation was in response to the circumstances described in In re M.M.C., 564 N.W.2d 9 (1997). (Response to Statement of Authorities, p. 5)(Conf.App. p. 32). In M.M.C., the thirteen year old child (Mark) was accused of first degree murder for the death of another child on June 9, 1994. In re M.M.C., 564 N.W.2d at 9-10. Mark was not eligible for waiver to adult court because he was not fourteen. Mark pled guilty to second degree murder and was placed at STS. In 1996, the juvenile court found Mark's placement had served him well and he was appropriate for probation in the custody of

his parents. The State appealed. Id. at 10. On May 21, 1997, the Supreme Court reversed the juvenile court finding "the gravity of the offense committed by Mark outweighs all other factors" of section 232.52(1). Id. at 12. The prosecution's speculation is not supported by any identifiable information. The legislature had two sessions to enact legislation in response to the child's actions but did not act until the 1997 session. The juvenile court's 1996 order releasing Mark was stayed pending appeal. Id. at 9. The Supreme Court decision did not occur until May 21, 1997. 564 N.W.2d 9 (1997). Senate File 515 was passed in April 1997, and approved May 7, 1997. 77th GA 1st Session SF515, p. 1.

Amendments

The legislative history of a statute is instructive of intent. State v. Dohlman, 725 N.W.2d 428, 431 (Iowa 2006). One of the canons of statutory interpretation directs the Court to examine amendments to existing statutes with an eye toward determining the legislative design which motivated the change. State v. One Certain Conveyance, 211 N.W.2d 297, 299 (Iowa

1973). In this regard, the Court assumes the amendment sought to accomplish some purpose and was not simply a futile exercise of legislative power. Mallory v. Paradise, 173 N.W.2d 264, 267 (Iowa 1969).

The "youthful offender" provisions have undergone one significant amended since 1997. 2013 Acts, ch. 42. Of note, the legislature amended the statute to allow prosecution as a "youthful offender" if the child is "twelve through fifteen years of age or the child is ten or eleven years of age and has been charged with a public offense that would be classified as a class "A" felony if committed by an adult." 2013 Acts, ch. 42, §5; Iowa Code §232.45(7)(a)(1) (2015). The explanation included in the Senate Study bill stated, in part:

> The bill redefines when a child may be considered for youthful offender prosecution and sentencing. The bill limits use of the option to situations in which the child is 12 through 15 years of age and has committed offenses which would be less than a class "A" felony if committed by an adult. For offenses which would be classified as a class "A" felony, the bill permits children who are 10 or 11 years of age to also be prosecuted and sentenced as a youthful offender.

85th GA 1st Session SSB 1151, p. 9, *available at* https://www.legis.iowa.gov/publications/search/document?fq=id:42141&q=232.45.

The 2013 amendment also rewrote Iowa Code section 907.3A.

> The bill standardizes the sentencing options and procedures for a juvenile who is prosecuted as an adult either because the offense is excluded from juvenile court jurisdiction or because the juvenile is waived to district court, and for any juvenile prosecuted as a youthful offender upon the youthful offender attaining the age of 18.

85th GA 1st Session SSB 1151, p. 9. A "youthful offender" now may receive a deferred judgment. 2013 Acts, ch. 42, §15; Iowa Code §907.3A (2015).

Iowa Code section 232.8(3)(a) (2011) provided that a child prosecuted as an adult, for an offense other than a Class A felony, was eligible for a deferred judgment while a "youthful offender" was not. Iowa Code §232.8(3)(a) (2011). It is illogical to allow for a deferred judgment for children fourteen years and older, but prohibit it for arguably less culpable children under the age of fourteen. The amendment to permit

a deferred judgment for "youthful offenders" reflects the correction of the differing treatment. This is especially true when one considers the change in specified minimum age for waiver to adult court for purposes of prosecution as a "youthful offender".

Goals of juvenile court.

The primary goal of juvenile justice in Iowa is rehabilitation, not punishment. In re M.M.C., 564 N.W.2d at 11. Delinquency proceedings are special proceedings that serve as an alternative to the criminal prosecution of a child. In re J.A.L., 694 N.W.2d 748, 751 (Iowa 2005). See also In re Johnson, 257 N.W.2d 47, 48 (Iowa 1977)("We begin our analysis with a recognition that proceedings in juvenile court are not prosecutions for crime. They are special proceedings which serve as an ameliorative alternative to criminal prosecution of children."). The objective of the proceedings is the best interests of the child. In re A.K., 825 N.W.2d 46, 49 (Iowa 2013); Iowa Code §232.1 (2011)(This chapter shall be liberally construed to the end that each child under the

jurisdiction of the court shall receive, preferably in the child's own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state.).

Adult sentencing goals differ from that of the juvenile court. The societal goals of sentencing criminal offenders focus on rehabilitation of the offender and the protection of the community from further offenses. A number of factors weigh in on the process of sentencing a criminal offender, including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform. State v. Seats, 865 N.W.2d 545, 552-553 (Iowa 2015). Although circumstances relating to rehabilitation tend to mitigate punishments, rehabilitation efforts remain only one of many relevant factors to consider. State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013); State v. Hopkins, 860 N.W.2d 550, 555 (Iowa 2015). Ultimately, sentencing decisions for adult offenders focus on retribution, incapacitation and rehabilitation.

The goals of adult criminal sentencing are generally incompatible to the best interest of a child, especially a young child such as Crooks at thirteen years old. This Court has found some adult criminal sentences to be unconstitutional when imposed upon a juvenile. Seats, 865 N.W.2d at 553–57; State v. Lyle, 854 N.W.2d 378, 384-386 (Iowa 2014); Ragland, 836 N.W.2d at 113–17; State v. Pearson, 836 N.W.2d 88, 95–97 (Iowa 2013); State v. Null, 836 N.W.2d 41, 70 (Iowa 2013). This Court is guided in statutory construction by "our mandate to construe statutes in a fashion to avoid a constitutional infirmity where possible." State v. Showens, 845 N.W.2d 436, 441 (Iowa 2014). See also Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010)("If fairly possible, a statute will be construed to avoid doubt as to constitutionality."). An interpretation that Iowa Code section 232.45(7) authorized the adult prosecution of a thirteen year old child would subject the statute to constitutional challenge and invalidity.

Based upon the explanations provided in the legislative bills, the goals of juvenile court and consideration of the

juvenile code and relevant context therein, Iowa Code section 232.45(7)(a)'s language of "fifteen years of age and younger" means fourteen and fifteen years of age. The 2011 statute did not authorize prosecution of Crooks, a thirteen year old, as a "youthful offender." Crooks' adult criminal conviction must be reversed and the case remanded to the juvenile court for appropriate further proceedings.

II. IOWA CODE SECTIONS 232.45(7)(a) and 907.3A (2011) VIOLATE ARTICLE I, SECTION 17 OF THE IOWA CONSTITUTION.

Standard of Review.

Review is de novo because the issue involves the interpretation and application of constitutional provisions. State v. Brooks, 760 N.W.2d 197, 204 (Iowa 2009).

Preservation of Error.

Crooks challenged Iowa Code section 232.45(7) violated the Iowa Constitution's prohibition of cruel and unusual punishment. (5/1/12 Motion to Dismiss)(Conf.App. pp. 50-51). The juvenile court denied the motion. (Ruling (Constitutional Claims))(Conf.App. pp. 77-84). Error was

preserved. Meier v. Senecaut, 641 N.W.2d at 537. Additionally, if a sentence is unconstitutional, it is illegal. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). A challenge to an illegal sentence is not subject to the usual requirements of error preservation. State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999).

Discussion.

On appeal, Crooks limits his constitutional challenge to Iowa Code sections 232.45(7) and 907.3A (2011) by asserting that the sections violate Article I, section 17 of the Iowa Constitution. Article I, section 17 provides: "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." Iowa Const. art. I, § 17.

The juvenile court found the "youthful offender" statute constitutional. The court stated:

> There appears to be no case law where, as here, a Defendant argues cruel and unusual punishment arising out of the process by which he is tried. Overall, the bedrock principle of cruel and unusual punishment as discussed in case law is that the punishment should not be disproportional to the crime.

While it is conceivable that the eventual outcome of this case could result in a punishment that would later be seen to be cruel and unusual according to the "evolving standard" discussed at the federal level in *Graham v. Florida*, nothing has occurred so far in this case which amounts to "punishment" that would support a cruel and unusual challenge. Under *State v. Tripp*, 776 N.W.2d 855 (Iowa 2010) an Eighth Amendment challenge is not ripe until the length of the sentence is determinable.

The State points out in its brief that significant procedural safeguards are present, should the Juvenile Court waive jurisdiction under the youthful offender statute. If jurisdiction is waived, Mr. Crooks would be afforded a jury trial in District Court, with all of the attendant trial and constitutional rights.

For the above reasons, the Court does not find that the Iowa Youthful Offender Waiver Statute, as set forth in Section 232.45(7), is unconstitutional at either the state or federal level due to the infliction of cruel and unusual punishment.

(Ruling (Constitutional Claims), pp. 3-4)(Conf.App. pp. 79-80).

"Youthful Offender" waiver

This Court has not previously addressed whether the waiver process implicates punishment. Several jurisdictions have characterized the waiver proceeding as adversarial and the decision to waive jurisdiction as punishment.[7] R.H. v. State, 777 P.2d 204, 210 (Alaska Ct. App. 1989)(Nor can juvenile waiver proceedings realistically be said to affect "only

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7 Discussing Fifth Amendment privilege.

the forum where the issue of guilt will be adjudicated." A juvenile waiver proceeding is the only available avenue by which the state may seek to prosecute a child as an adult.); Ramona R. v. Superior Court, 37 Cal.3d 802, 810 (Cal. 1985)(The result of a fitness hearing is not a final adjudication of guilt; but the certification of a juvenile offender to an adult court has been accurately characterized as "the worst punishment the juvenile system is empowered to inflict."); People v. Hana, 804 N.W.2d 166, 181 (Mich. 1993)(Cavanagh, C.J., dissenting)("There can also be no question regarding the punitive nature of the decision to waive juvenile jurisdiction over [child]").

A contrary reasoning ignores reality. "The waiver of juvenile court jurisdiction is "a sentencing decision that represents a choice between the punitive disposition of adult criminal court and the 'rehabilitative' disposition of the juvenile court."" People v. Hana, 804 N.W.2d at 180 (Cavanagh, C.J., dissenting)(other citations omitted). The decision to waive jurisdiction is a choice to place a child in the court with a much different basic philosophy. The juvenile court is committed to

the rehabilitation of children, while the primary commitment of the adult criminal court is retribution and deterrence. Id. at 181 fn.10. In seeking waiver of a child, the State is not acting as parens patriae to determine custody in the best interest of the child. The State is seeking criminal proceedings and punishment against the child. Id. at 181.

> Aptly referred to as "the most important dispositional decision in the juvenile court," the decision to waive jurisdiction is, in reality, a decision to forgo any rehabilitative effort and to punish the juvenile as an adult upon conviction. Indeed, some courts have characterized the waiver of juvenile court jurisdiction as "the worst punishment the juvenile system is empowered to inflict."

Id. at 182.

Sentence imposed pursuant to Iowa Code section 907.3A.

This Court in Sweet summarized the principles of the United States Supreme Court cases involving juveniles facing death or life in prison. Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005); Montgomery v. Louisiana, 577 U.S. ____, 136 S.Ct. 718

(2016). See also Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Sweet Court stated, in relevant part:

i. Juveniles are constitutionally different than adults for purposes of sentencing. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2464, 183 L.Ed.2d at 418; *Graham*, 560 U.S. at 68, 130 S.Ct. at 2026, 176 L.Ed.2d at 841; *Roper*, 543 U.S. at 569–71, 125 S.Ct. at 1195–96, 161 L.Ed.2d at 21–22.

ii. Because of these differences, ordinary criminal culpability is diminished when the offender is a youth, and the penological objectives behind harsh sentences are diminished. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2465, 183 L.Ed.2d at 419; *Graham*, 560 U.S. at 74, 130 S.Ct. at 2030, 176 L.Ed.2d at 845; *Roper*, 543 U.S. at 571, 125 S.Ct. at 1196, 161 L.Ed.2d at 22; cf. *Atkins*, 536 U.S. at 316, 122 S.Ct. at 2250, 153 L.Ed.2d at 348.

iii. The traits of youth that diminish ordinary criminal culpability are not crime specific and are present even in juveniles who commit heinous crimes. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 735–36, 193 L.Ed.2d at 621–22; *Miller*, 567 U.S. at ——, 132 S.Ct. at 2465, 183 L.Ed.2d at 420.

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v. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen, but society has generally drawn the line at eighteen for the purposes of distinguishing juveniles from adults. *Graham*, 560 U.S. at 74–75, 130 S.Ct. at 2030, 176 L.Ed.2d at 845; *Roper*, 543 U.S. at 574, 125 S.Ct. at 1197, 161 L.Ed.2d at 24.

vi. Because the signature qualities of youth are transient, incorrigibility is inconsistent with youth. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2465, 183 L.Ed.2d at 419; *Graham*, 560 U.S. at

73, 130 S.Ct. at 2029, 176 L.Ed.2d at 844; *Roper*, 543 U.S. at 570, 125 S.Ct. at 1195, 161 L.Ed.2d at 22.

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viii. Even trained and experienced professionals find it very difficult to predict which youthful offenders might ultimately fit into this small group of incorrigible offenders. *Graham*, 560 U.S. at 72–73, 130 S.Ct. at 2029, 176 L.Ed.2d at 844; *Roper*, 543 U.S. at 573, 125 S.Ct. at 1197, 161 L.Ed.2d at 24.

ix. An unacceptable likelihood exists that the brutality or cold-blooded nature of a particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence. *Graham*, 560 U.S. at 77–78, 130 S.Ct. at 2032, 176 L.Ed.2d at 847; *Roper*, 543 U.S. at 573, 125 S.Ct. at 1197, 161 L.Ed.2d at 24.

x. Juveniles are less able to provide meaningful assistance to their lawyers than adults, a factor that can impact the development of the defense and gives rise to a risk of erroneous conclusions regarding juvenile culpability. *Graham*, 560 U.S. at 78, 130 S.Ct. at 2032, 176 L.Ed.2d at 847–48; cf. *Atkins*, 536 U.S. at 320, 122 S.Ct. at 2252, 153 L.Ed.2d at 350.

State v. Sweet, 879 N.W.2d 811, 830-831 (Iowa 2016).

The Iowa Supreme Court considered the application of the Roper–Graham–Miller reasoning under Article I, section 17 of the Iowa Constitution. In these cases, the Court primarily embraced the reasoning in the United States Supreme Court's cases under the Iowa Constitution but also built upon it and

extended its principles. Seats, 865 N.W.2d at 553–57; Lyle, 854 N.W.2d at 383–84; Ragland, 836 N.W.2d at 113–17; Pearson, 836 N.W.2d at 95–98; Null, 836 N.W.2d at 70; Sweet, 879 N.W.2d at 839. In Ragland, Pearson, and Null, the Court required individualized hearings in cases involving long prison sentences for juvenile defendants short of life in prison without the possibility of parole. Ragland, 836 N.W.2d at 122; Pearson, 836 N.W.2d at 97; Null, 836 N.W.2d at 76–77. In Lyle, the Court extended the requirement of an individualized hearing when sentencing juveniles for lesser crimes for which the legislature has prescribed mandatory adult sentences. Lyle, 854 N.W.2d at 396–98. And finally, in Sweet, the Court concluded that a sentence of life without the possibility of parole for juvenile offenders violated Article I, section 17 of the Iowa Constitution. Sweet, 879 N.W.2d at 839.

Crooks requests this Court take the next logical step and define at what age a child may be subject to adult prosecution and punishment. The waiver of and sentencing of a thirteen year old child violates Article I, section 17 of the Iowa

Constitution. This Court should adopt a categorical bar on imposing punishment upon a child under the age of fourteen in adult court.

In considering whether to adopt a categorical approach to the class of offenders or offenses under the cruel and unusual punishment clause of the Iowa Constitution, the Court has referred to the two-step process found in the cases of the United States Supreme Court. Applying this test, the Court first looks to whether there is a consensus, or at least an emerging consensus, to guide the court's consideration of the question. Second, the Court exercises its independent judgment to determine whether to follow a categorical approach. Sweet, 879 N.W.2d at 835; Lyle, 854 N.W.2d at 386. The federalism concerns are entirely absent in our state court decision. Sweet, 879 N.W.2d at 835.

A survey of state statutes show that twenty states authorize children under the age of fourteen to be prosecuted

and punished as adults.[8] See Alaska Stat. §47.12.100 (no age); Colo Rev. Stat. §19.2-518 (12 for discretionary waiver for specified offenses); GA. Code Ann. §§15-11-561 (13 for discretionary transfer for specified offenses) and 15-11-560 (13 exclusive adult jurisdiction for specified offenses); Idaho Code §20-509 (under age 14 for specified offenses); Ill. Ann. Stat. ch. 705 § 405/5-805(3) (13 for discretionary wavier) and §405/5-810 (13 for extended jurisdiction); Me. Rev. Stat. Ann. Tit. 15, §3101(4) (no age); Miss. Code Ann. §§43-21-151 (13 for exclusive adult jurisdiction for specified offenses) and 43-21-157 (13 for discretionary waiver); Mo. Rev. Stat. §211.071 (12 for transfer); Mont. Code Ann. §41-5-206 (12 for specified offenses); Nev. Rev. Stat. §62B.390 (13 for murder or attempted murder); N.H. Rev. Stat. Ann. §628.1(II)(13 for discretionary waiver for specified offenses); N.Y. Penal Law §30 (McKinney)(13 for specified offenses); N.C. Gen. Stat. §7B-2200 (13); Okla. Stat. Ann. tit. 10a, §2-5-101 (13 for murder 1st); 42 PA. Cons. Stat. Ann. § 6302 (murder is not "delinquent act");

[8] Appellant was unable to determine the current law in Vermont.

R.I. Gen. Law §14-1-7 ("any child" for offense punishable by life imprisonment); S.C. Code Ann. §20-7-7605 (no age for murder or criminal sexual conduct); S.D. Codified Laws Ann. §§26-8C-2 (10 to be "delinquent child") and 26-11-4 (charged with felony); Tenn. Code Ann. §37-1-134 (no minimum age for discretionary waiver for specified offenses); Wis. Stat. Ann. §938.183 (10 for specified offenses). The states which allow prosecution and punishment of children under the age of fourteen do so for only limited serious offenses. There appears to be no national consensus on the minimum age to hold children criminally responsible.

"[C]onsensus is not dispositive." Lyle, 854 N.W.2d at 387 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421, 128 S.Ct. 2641, 2650 (2008)). As Miller made evident, constitutional protection for the rights of juveniles in sentencing for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary. Lyle, 854 N.W.2d at 387.

In sentencing, there is certainly the trend which recognizes that children are different. Sweet, 879 N.W.2d at 836. Additionally, there appears to be a trend to raise the age for juvenile court jurisdiction. Many state legislatures are introducing "raise the age" bills. Lorelei Laird, *Age Appropriate: Fueled By New Research And Bipartisan Interest In Criminal Justice Reform, States Are Raising The Age For Adult Prosecution Back To 18*, ABA Journal, Feb. 2017, available at http://www.abajournal.com/magazine/article/adult_prosecution_juvenile_justice. For example, since 2009, seven states have raised the age of adult prosecutions to eighteen and five more states tried during the 2015-2016 legislative sessions. Id. at *1. In 2016, three states proposed raising the age to twenty-one. The measure failed in Connecticut and Illinois. Vermont decided to study the idea first. Id. at *6. The proposed legislation demonstrates the sound policy behind

treating children differently.[9]

After examination of other state statutes, prosecution of juvenile offenders in adult court, professional opinions, and any other source, ultimately this Court must make an independent judgment. Sweet, 879 N.W.2d at 836.

This Court has recognized the Iowa Constitution is a living document. In In re Johnson, this Court stated:

*** we recognize that unlike statutes, our constitution sets out broad general principles. A constitution is a living and vital instrument. Its very purpose is to endure for a long time and to meet conditions neither contemplated nor foreseeable at the time of its adoption. Thus the fact a separate juvenile court system was not in existence at the time our constitution was adopted in 1857 should not blindly mandate an absurd result because our forefathers had not yet seen fit to establish a separate juvenile court system. Sometimes, as here, the literal language must be disregarded because it does violence to the general meaning and intent of the enactment.

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*** Constitutions must have enough flexibility so as to be interpreted in accordance with the public interest. This means they must meet and be applied to new and changing conditions. ***

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9 For research into long-term individual, family and civil and social impairment consequences see http://www.campaignforyouthjustice.org/collateralconsequences/

In re Johnson, 257 N.W.2d at 50 (other citations omitted). As this Court stated in Lyle:

> Time and experience have taught us much about the efficacy and justice of certain punishments. As a consequence, we understand our concept of cruel and unusual punishment is "not static." Instead, we consider constitutional challenges under the "currently prevail[ing]" standards of whether a punishment is "excessive" or "cruel and unusual." This approach is followed because the basic concept underlying the prohibition against cruel and unusual punishment "is nothing less than the dignity" of humankind. This prohibition "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " In other words, punishments once thought just and constitutional may later come to be seen as fundamentally repugnant to the core values contained in our State and Federal Constitutions as we grow in our understanding over time. As with other rights enumerated under our constitution, we interpret them in light of our understanding of today, not by our past understanding.

Lyle, 854 N.W.2d at 384-385 (other citations omitted).

At common law, children under the age of seven lacked criminal capacity, and children between seven and fourteen years of age were presumed to lack criminal capacity. But juveniles over fourteen were presumed to have the capacity to commit criminal acts. Lyle, 854 N.W.2d at 390. See also In re

Gault, 387 U.S. 1, 16, 87 S.Ct. 1428, 1438 (1967). "For the first hundred years or so after the founding of the United States, juveniles, if they were tried at all, were tried in adult courts." Null, 836 N.W.2d at 52. "Prior to the creation of juvenile courts, 'adult crime' meant 'adult time,' therefore states tried and sentenced children as adults, and imprisoned and executed them for crimes committed as young as ten, eleven, or twelve years of age." Lyle, 854 N.W.2d at 390.

The juvenile court movement stated at the end of the nineteenth century. In re Gault, 387 U.S. at 14, 87 S.Ct. at 1437.

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial.

In re Gault, 387 U.S. at 15, 87 S.Ct. at 1437. "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." Id. "Theoretically, youthful offenders would not face any actual prison time as a result of most juvenile court proceedings." Lyle, 854 N.W.2d 390.

Prior to 1995, the juvenile court had exclusive jurisdiction of children alleged to have committed delinquent acts.[10] Iowa Code §232.8 (1995); 95 Acts, ch. 191, §8 (adding subsection (c) providing for direct adult filing for specified offenses committed by children 16 and 17). "Traditional" waiver of a child to adult court for prosecution is set at a minimum age of fourteen years. Iowa Code §232.45(6)(2011). The statute demonstrates the Iowa legislature has set the age of criminal responsibility at age fourteen.

Authorizing children under the age of fourteen to be prosecuted and punished as adults is inconsistent with

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10 Except designated simple misdemeanors.

requiring a child to be fourteen to be placed in jeopardy of adult punishment. It is of no consequence that a "youthful offender" is subject to the shared jurisdiction of the adult and the juvenile courts until he reaches age eighteen. Upon attaining the age of majority, a "youthful offender" is subject to the determination whether he should be punished as an adult. The goals of juvenile court then are replaced by the goals of adult sentencing – retribution and deterrence. There is no distinction between waiver for prosecution as a "youthful offender" and "traditional" waiver for prosecution as an adult. The result is the same. Punishing a child under the age of fourteen for retributive purposes violates Article I, section 17 of the Iowa Constitution because of the child's categorically diminished culpability.

In Lyle, this Court acknowledged it could not ignore that over the last decade, juvenile justice has seen remarkable change. The time is now to hold that children under the age of fourteen cannot be punished in adult court without violating the protections against cruel and unusual punishment as guaranteed by Article I, section 17 of the Iowa Constitution.

Crooks' adult criminal conviction must be reversed and the case remanded to the juvenile court for appropriate further proceedings.

III. THE SENTENCING COURT ABUSED ITS DISCRETION IN IMPOSING SENTENCE.

Standard of Review.

A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.907; State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996). A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure. State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983). An abuse of discretion will be found only when a court acts on grounds clearly untenable or to an extent clearly unreasonable. State v. Oliver, 588 N.W.2d 412, 414 (Iowa 1998).

Preservation of Error.

The general rule of error preservation is not applicable to void, illegal or procedurally defective sentences. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

Discussion.

The court stated that it would not impose a minimum sentence.

So with that, I've got probation on the one hand or I've got an indeterminate term not to exceed 50 years on the other hand. There will be -- if incarceration is ordered there's no mandatory minimum. The State is not seeking that. And I would point out that I -- although I don't have to decide it, I highly suspect that that would not even be considered a constitutional option for a youthful offender.

(Sent. Tr. p. 34L13-20). The court stated its reasons for imposing incarceration:

At this point I do not see sufficient evidence to convince me that Noah has been rehabilitated. The nature and circumstances of this offense, coupled with the lack of emotion, remorse, and empathy, indicates that there is a lot of ground to cover. There have been some recent expressions of remorse and attempts to show empathy, and I hope that those are sincere, but the fact that they are so recent causes me to wonder. And, Noah, going forward you'll have the opportunity to prove to everybody that you mean what you say. You've heard the saying "actions speak louder than words," and I suspect that's what your family is waiting for, and I know that's what the rest of us will be looking for as well.

I'm also concerned, when we talk about the appropriateness of street probation, that you have made the comment that you really don't think you have any need for future services. You made a comment, when asked whether you perhaps would want to return to the Training School to speak some day after you've been rehabilitated, you didn't really think so or you hoped not, I

think were your words. You changed your answer after you were pressed on it a little bit, but those comments are concerning to me, that you still don't have a full appreciation for what you've done and the legitimacy of everyone's concerns. I am hopeful, but I'm not yet convinced, that it is safe for you to be free despite your young age. The lack of an appropriate emotional response, the lack of empathy, the lack of something that even approaches an adequate explanation for why this happened could be an indication that you just don't care. We just don't know yet. That's the point, we don't know. And I don't believe it's appropriate to release you on probation until we can be confident that that isn't the situation, but rather that you do care and that we don't have to worry about something like this happening down the road. And, in short, we need more time so that we can be confident in that determination.

So I do believe that the imposition of a sentence with incarceration is appropriate, and to that end it is necessary that I enter conviction. ***

(Sent. Tr. p. 35L9-p. 36L22).

The court abused its discretion in imposing sentence. In exercising its discretion, the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances of reform. State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995). The court owes a duty to both the defendant and the public. As such, the court must exercise the sentencing option that would

best accomplish justice for both society and the individual defendant, after considering all pertinent sentencing factors. State v. Fink, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982).

To ensure that the appellate court can review the sentencing court's decision and determine whether the court exercised its discretion, the court must state on the record its reasons for imposing a particular sentence. Iowa R. Crim. P. 2.23(3)(d); State v. Jacobs, 607 N.W.2d 679, 690 (Iowa 2000). A trial court need not give reasons for rejecting particular sentencing options. State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996). However, the record must reveal the sentencing court, in fact, exercised discretion with respect to the options it had. Id.

a. The district court abused its discretion for erroneously believing the only options were incarceration or street probation.

After determining Crooks should not be discharged, the court stated: "So, simply stated, I have two options at this point in time. One is some type of street probation and the other would be a term of incarceration, ..." (Sent. Tr. p.

33L16-22). The court later stated, "So with that, I've got probation on the one hand or I've got an indeterminate term not to exceed 50 years on the other hand." (Tr. p. 34L13-15). The district court did not recognize the sentencing options available and therefore failed to properly exercise its discretion. State v. Ayers, 590 N.W.2d 25, 27 (Iowa 1999).

The court is to hold a hearing before the child's eighteenth birthday to determine whether he shall continue on "youthful offender" status after his birthday under the supervision of the court or be discharged. Iowa Code §907.3A(2) (2011). The authority to sentence Crooks is found in Iowa Code section 907.3A(3) (2011).

> Notwithstanding any provision of the Code which proscribes a mandatory minimum sentence for the offense committed by the youthful offender, following transfer of the youthful offender from the juvenile court back to the court having jurisdiction over the criminal proceedings involving the youthful offender, the court may continue the youthful offender deferred sentence or enter a sentence, which may be a suspended sentence. Notwithstanding anything in section 907.7 to the contrary, if the district court either continues the youthful offender deferred sentence or enters sentence, suspends the sentence, and places the youthful offender on probation, the term of formal supervision shall commence upon entry of the order by the district court and may continue for a period not to exceed

five years. If the district court enters a sentence of confinement, and the youthful offender was previously placed in secure confinement by the juvenile court under the terms of the initial disposition order or any modification to the initial disposition order, the person shall receive credit for any time spent in secure confinement. During any period of probation imposed by the district court, a youthful offender who violates the terms of probation is subject to section 908.11.

Iowa Code §907.3A(3) (2011).

Section 907.3A(3)(2011) provides two options for a youthful offender: (1) continue the deferred sentence; or (2) enter a sentence which may be suspended. If the court continues the deferred sentence, the court had the option of imposing conditions authorized by Iowa Code section 907.3(2) (2011 Supp.).

At the time of or after pronouncing judgment and with the consent of the defendant, the court may defer the sentence and assign the defendant to the judicial district department of correctional services. The court may assign the defendant to supervision or services under section 901B.1 at the level of sanctions which the district department determines to be appropriate. ***

Iowa Code §907.3(2) (2011 Supp.). Iowa Code section 901B.1 provides for a corrections continuum, including quasi-incarceration. Iowa Code §901B.1(1)(c) (2015). The

district court had the authority to order Crooks to be placed in the residential treatment facility. Iowa Code §901B.1(1)(c)(1) (2015).

Likewise, if the court suspended Crooks' sentence, the court has the authority to order him to complete the programing at the residential treatment facility. Iowa Code section 907.3(3) provides:

> By record entry at the time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require including commitment to an alternate jail facility or a community based correctional residential treatment facility to be followed by a period of probation as specified in section 907.7, or commitment of the defendant to the judicial district department of correctional services for supervision or services under section 901B.1 at the level of sanctions which the district department determines to be appropriate and the payment of fees imposed under section 905.14. * * *

Iowa Code §907.3(3) (2011 Supp.).

The sentencing court also had the authority to grant Crooks a deferred judgment pursuant to Iowa Code section 907.3A(3)(a) (2015). An amendment to a sentencing statute that reduces the penalty for an offense committed prior to its effective date must be applied if the statute is effective at the

time of sentencing. Iowa Code §4.13(2) (2015); State v. Chrisman, 514 N.W.2d 57, 61 (Iowa 1994). The amendment to section 907.3A reduced the punishment for the offense with which defendant was charged, he was entitled to be sentenced in accordance with the newly enacted law. State v. Trader, 661 N.W.2d 154, 156 (Iowa 2003).

The district court failed to recognize its discretion. A remand for resentencing is required where a court fails to exercise discretion because it believes it has no discretion. State v. Sandifer, 570 N.W.2d 256 (Iowa Ct. App. 1997). Crooks' sentence should be vacated and remanded for a new sentencing hearing where the district court should exercise its discretion in selecting an appropriate sentence from all of the available sentencing options.

b. The district court abused its sentencing discretion by failing to consider the Miller factors on the record.

The prosecution asserted the district court only had to consider the Lyle factors if the court were to impose a minimum sentence. (Sent. Tr. p. 11L13-22). The court did not consider

imposing the mandatory minimum sentence. (Sent. Tr. p. 34L15-20).

The "minimal essential factors" that must be considered and weighed by the sentencing court include the nature of the offense; the attending circumstances; the defendant's age, character, propensities, and chances of reform. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979); Iowa Code §907.5 (2015). A sentencing court must also consider any mitigating circumstances relating to a defendant. State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); Iowa Code §901.3(1)(g) (2015).

In sentencing a juvenile as an adult when a mandatory minimum sentence is an option, the district court must also "undertake an analysis of '[e]verything [the U.S. Supreme Court] said in Roper and Graham" about youth.' " Null, 836 N.W.2d 41, 74 (Iowa 2013) (quoting Miller, 132 S.Ct. at 2467)). If a mandatory minimum sentence is at issue

> the district court shall conduct a hearing in the presence of the defendant and decide, after considering all the relevant factors and facts of the

> case, *whether or not* the seventy percent mandatory minimum period of incarceration without parole is warranted as a term of sentencing in the case.

Lyle, 854 N.W.2d at 404 n.10 (emphasis added).

The district court abused its discretion by failing to place its consideration of the Miller factors on the record even though it did not impose a mandatory minimum. "Children are constitutionally different from adults for purposes of sentencing." Lyle, 854 N.W.2d at 395 (quoting Miller, 132 S.Ct. at 2464). Crooks was thirteen years old at the time of the offense. Nevertheless, the sentencing court failed to meaningfully consider his juvenile status on the record when it sentenced him.

Juveniles have "distinctive (and transitory) mental traits and environmental vulnerabilities," Miller, 132 S.Ct. at 2465, including a "lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juvenile's character," Null, 836 N.W.2d at 74. Such characteristics of youth must be taken into account at sentencing. Sentencing courts must recognize that a juvenile

offender's "culpability is necessarily and categorically reduced as a matter of law." Lyle, 854 N.W.2d at 386. Moreover, the "deterrence" and "incapacitation" rationales for punishment must play less of a role for juveniles as compared with adult offenders. Id. at 399.

The reasoning employed in the Miller and Null line of cases for juvenile offenders is neither "crime-specific" nor "punishment-specific." Lyle, 854 N.W.2d at 399. Though initially articulated in the context of more severe sentences, the constitutional obligation to undertake an individualized sentencing process which takes into consideration the mitigating characteristics of the juvenile's youth "also applies, perhaps more so, in the context of lesser penalties as well." Lyle, 854 N.W.2d at 396. "As a result, it can be argued that the diminished culpability of juveniles must always be a factor considered in criminal sentencing." Null, 836 N.W.2d at 67. Fundamentally, our courts "require [a sentencer] to take into account how children are different." Lyle, 854 N.W.2d at 395 (quoting Miller, 132 S.Ct. at 2469). For juveniles sentenced as

adults, the constitutional protection against cruel and unusual punishment "demands some assurance that imprisonment is actually appropriate and necessary." Lyle, 854 N.W.2d at 401.

The court did not impose a mandatory minimum in this case. A mandatory sentencing scheme which deprives courts of an opportunity to take youth into account as a mitigating factor is unconstitutional because it "poses too great a risk of disproportionate punishment." Lyle, 854 N.W.2d at 395 (quoting Miller, 132 S.Ct. at 2469). However, the same is true where, as here, the (non-mandatory) sentencing scheme allows the court an opportunity to take youth into consideration, but the court fails to do so in a meaningful way.

> [T]he mere theoretical availability of unguided sentencing discretion, no matter how explicitly codified, is not a panacea. As we said in *Null*, *Miller* requires "more than a generalized notion of taking age into consideration as a factor in sentencing." *Null* provides a district court must expressly recognize certain concepts and "should make findings why the general rule [that children are constitutionally different from adults] does not apply." In *Ragland*[ ], we noted the sentencing court "must consider" several factors at the sentencing hearing, including: (1) the "chronological age" of the youth and the features of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the "family and home environment" that surrounded the youth; (3) "the

circumstances of the ... offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected [the youth]"; (4) the "incompetencies associated with youth—for example, [the youth's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the youth's] incapacity to assist [the youth's] own attorneys"; and (5) "the possibility of rehabilitation." Clearly, these are all mitigating factors, and they cannot be used to justify a harsher sentence.

Lyle, 854 N.W.2d at 403 n.8 (internal citations omitted).

The Iowa Rules of Criminal Procedure require that a sentencing court state on the record the reasons for selecting a particular sentence to ensure the appellate court properly exercised its discretion. Iowa R. Crim. P. 2.23(3)(d); State v. Jacobs, 607 N.W.2d 679, 690 (Iowa 2000). The court's consideration of the Miller factors is constitutionally required before the court may impose a mandatory minimum, so the conclusions reached during the Miller analysis inform every part of the sentencing decision. Because juveniles are constitutionally different from adults, such findings are necessary to a sentencing court's proper exercise of its sentencing discretion when a juvenile is sentenced as an adult and a sentencing court's failure to consider the Miller factors

and make the Miller findings on the record amounts to an abuse of discretion.

The district court here did not "expressly recognize" the Miller mitigating factors of youth or reveal on the record its consideration of the Miller factors. The court's stated reasons for imposing a prison term focused entirely on "the nature and circumstances of this offense, coupled with the lack of emotion, remorse, and empathy" (Sent. Tr. p. 35L9-21), raising a concern of the "unacceptable likelihood . . . that the brutality or cold-blooded nature of [the] crime would overpower mitigating arguments based on youth as a matter of course." Roper v. Simmons, 543 U.S. at 573, 125 S. Ct. at 1197. Accordingly, Crooks' sentence should be vacated and his case remanded for a new sentencing hearing.

c. The district court abused its discretion in imposing incarceration.

The court's reasons for imposing incarceration boils down to the belief that Crooks is not rehabilitated and poses a potential danger to society. The court stated:

At this point I do not see sufficient evidence to convince me that Noah has been rehabilitated. The nature and circumstances of this offense, coupled with the lack of emotion, remorse, and empathy, indicates that there is a lot of ground to cover.
* * *
I am hopeful, but I'm not yet convinced, that it is safe for you to be free despite your young age. The lack of an appropriate emotional response, the lack of empathy, the lack of something that even approaches an adequate explanation for why this happened could be an indication that you just don't care. We just don't know yet. That's the point, we don't know. And I don't believe it's appropriate to release you on probation until we can be confident that that isn't the situation, but rather that you do care and that we don't have to worry about something like this happening down the road. And, in short, we need more time so that we can be confident in that determination.

(Sent. Tr. p. 35L9-p. 36L19). The evidence presented at the sentencing hearing does not support the court's conclusion.

JCO Jensen filed a Youthful Offender Report. (Sent. Ex. 2)(Conf.App. pp. 169-171). Jensen summarized the history of Crooks' involvement with Juvenile Court Services. Jensen noted that Crooks had provided explanations for killing his mother. The reasons provided included: "I don't know"; "I thought we would be better off without her"; and "I didn't think of the consequences. I didn't think anything would happen. I thought I would maybe get grounded." Jensen noted "Any

answer Noah could give would not be an acceptable answer to his father and family members." (Sent. Ex. 2, p. 2)(Conf.App. p. 170).

Crooks' overall behavior at the State Training School had been positive. (Sent. Ex. 2, p. 2)(Conf.App. p. 170). Crooks was admitted to STS on May 31, 2013. (Sent Ex. 4, p. 1)(Conf.App. p. 196). "The only notable behavior problem consisted of Noah telling a peer, "You better quit it, or when I get out I will kill your mother too." (Sent. Ex. 2, p. 2)(Conf.App. p. 170). Crooks' statement was in response to the other student harassing him for a week or more, calling him "serial killer" and "mother killer" and "such." Crooks was given several consequences which he handled appropriately. This incident happened on August 7, 2013. (Sent. Ex. 4, p. 9)(Conf.App. p. 204).

By January 14, 2014, Crooks reached level III of III and step 10 of 10. (Sent. Ex. 4, p. 17)(Conf.App. p. 212). He maintained the top of the STS level system throughout the

reporting periods. (Sent. Ex. 4; Sent. Ex. 5)(Conf.App. pp. 195-232, 233-270).

Crooks graduated from high school on May 29, 2015. (Sent. Ex. 2, p. 2)(Conf.App. p. 170). Crooks had met the requirements for graduation on December 24, 2014, but held off on the ceremony until his father could/would attend. In the meantime, Crooks participated in vocational training. (Sent. Ex. 5, p. 44, 46, 48, 51, 54)(Conf.App. pp. 239, 241, 243, 246, 249).

Crooks matured during his years at STS. (Sent. Ex. 2, p. 3)(Conf.App. p. 171). STS assisted Crooks in planning for his future. (Sent. Ex. 5; Sent Ex. 3)(Conf.App. pp. 233-270, 172-194).

In 2012, Doctors Taylor and Salter predicted a grim future for Crooks. (Sent. Ex 1; Sent Ex. 6)(Conf.App. pp. 164-168, 271-288). In 2013, Dr. Ausperger, likewise, opined he was developing antisocial personality disorder. (Sent. Ex. 3, p. 2)(Conf.App. p. 174). However, upon evaluating Crooks again in April 2016, Dr. Ausperger opined Crooks did not have any

diagnosable mental disorder. Therefore, Ausperger could not state Crooks was developing an antisocial personality disorder since he has not exhibited behavior required to substantiate a diagnostic development since admission to STS. (Sent. Ex. 3, p. 5)(Conf.App. p. 177). Ausperger concluded that it was possible, but it would not be easy, that Crooks completely controlled his behavior and covered up his psychopathic thinking for three years while being closely supervised. Ausperger believed it was unlikely that Crooks made no changes in his thinking. (Sent Ex. 3, p. 5)(Conf.App. p. 177). Ausperger could make no assurances. However, if "one believed in the purpose of having a separate juvenile judicial system, that it is possible and desirable to educate and train young people in the hopes of changing them, then one must be hopeful that he is a successful product of that system." (Sent. Ex. 3, p. 6)(Conf.App. p. 178).

Crooks personally spoke at the sentencing hearing. He stated he learned empathy. He regretted his decisions and actions. Crooks explained he has grown and benefitted from

the STS programs. He expressed he was a much more mature person who thinks of others and the consequences of his actions. Crooks recognized he needed some additional assistance upon his release from the training school, but had support systems in place as well as probation supervision. (Tr. p. 18L5-p. 19L22).

The court also heard victim impact statements from Gretchen's family members. (Sent. Tr. p. 22L2-p. 31L5). Crooks' uncle expressed his belief that Crooks showed no remorse. He requested the maximum sentence. (Sent. Tr. p. 23L23-25, p. 24L3-19). Crooks' grandfather expressed his belief that the world would not be safe if he were released. He believed Crooks had not received any medical help which he needs. He did not know if Crooks could be helped or rehabilitated, may be a serial killer and should be locked up indefinitely. (Sent. Tr. p. 25L6-p. 26L4). Crooks' grandmother stated she believed Crooks has no real empathy and had not since he was a child. She felt it necessary to protect her pet and other grandchildren from him. She

expressed that she wanted Crooks safe and society safe from him. (Sent. Tr. p. 26L11-p. 27L1). Crooks' father also stated that he should not be released. He had pushed Crooks about what had happened. But they never talked about Gretchen. Crooks had no remorse about his mom. William expressed his son needed to pay for his mother's life. Releasing Crooks would ruin so many more lives; it would ruin the life William rebuilt. (Sent. Tr. p. 27L11-p. 31L2).

The court found the "common theme throughout the documents that have been submitted, and even comments made [at sentencing], is that there has been a surprising lack of an emotional response from Noah, something showing appropriate remorse, empathy, which understanding the feelings of the other people who have been affected by your actions." (Sent. Tr. p. 32L22-p. 33L5). The up-to-date documents do not support the court's conclusion. It is true in October 2013, Dr. Wright stated that Crooks did not have a great deal of guilt, shame, or remorse for his crime. (Sent. Ex. 3, p. 7)(Conf.App. p. 179). Two psychological notes, from

December 2014 and March 15, 2015, indicate Dr. Wright worked with Crooks to "building emotional strength", and to "stimulate his affect". (Sent. Ex. 3, pp. 11, 13)(Conf.App. pp. 183, 185). The more recent psychological notes do not indicate any lack of remorse or inappropriate affect. (Sent. Ex 3)(Conf.App. pp. 172-194).

The district court improperly speculated Crooks had shown no remorse for causing his mother's death. The district court's reasons for incarceration are not supported by the record. Crooks sentence should be vacated and remanded for re-sentencing.

CONCLUSION

Noah Crooks respectfully requests this Court reverse his conviction for murder in the second degree and remand for further proceedings in the juvenile court. Alternatively, Crooks requests this Court vacate his sentence and remand for resentencing.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.77, and that amount has been paid in full by the Office of the Appellate Defender.

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